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I.D. # 3997

The Honorable Dan Morales  
Attorney General of Texas  
Supreme Court Building  
P.O. Box 12548  
Austin, Texas 78711-2548

*RQ-1054*

**RECEIVED**

DEC 17 1997

**Opinion Committee**

Attention: Ms. Sarah J. Shirley, Chair  
Opinion Committee

Re: Whether the interest earned on the "hot check" fund administered by the Harris County District Attorney accrues to the fund itself or to the county's general revenue fund

Dear Ladies and Gentlemen:

Your advice is requested concerning the following question:

Should the interest earned on funds collected by the Harris County District Attorney pursuant to TEX. CODE CRIM. PROC. ANN. art. 102.007 (Vernon 1998) accrue to the "hot check" fund itself or to the county's general revenue fund?

Please find attached a memorandum brief. Your cooperation in this matter is greatly appreciated. Should you have any questions or require further information, please do not hesitate to call.

Sincerely,

**MICHAEL P. FLEMING**  
County Attorney

*John M. Renfrow*  
By JOHN M. RENFROW  
Assistant County Attorney

Attachment

Certified Mail, Return Receipt Requested

## MEMORANDUM BRIEF

### QUESTION PRESENTED:

Should the interest earned on funds collected by the Harris County District Attorney pursuant to TEX. CODE CRIM. PROC. ANN. art. 102.007 (Vernon 1998) accrue to the "hot check" fund itself or to the county's general revenue fund?

### INTRODUCTION:

When a county attorney, district attorney, or criminal district attorney collects and processes dishonored or forged checks, TEX. CODE CRIM. PROC. ANN. art. 102.007 (Vernon 1998) authorizes collection of a fee,<sup>1</sup> which is payable by any person who is a party to the offense. These fees are deposited into a fund commonly referred to as the "hot check" fund. Article 102.007(f) states that:

Fees collected under Subsection (c) of this article shall be deposited in the county treasury in a special fund to be administered by the county attorney, district attorney, or criminal district attorney. Expenditures from this fund shall be at the sole discretion of the attorney and may be used only to defray the salaries and expenses of the prosecutor's office, but in no event may the county attorney, district attorney, or criminal district attorney supplement his or her own salary from this fund.

The hot check fund has been the subject of many Attorney General opinions. In general, the district attorney must comply with the accounting and control procedures prescribed by the county auditor in administering the fund. See Op. Tex. Att'y Gen. Nos. JM-967 (1988), JM-632 (1987), MW-584 (1982), and MW-188 (1980). However, hot check funds may be used to increase salaries of the district attorney's staff without the prior approval of commissioners court and commissioners court may not subsequently reduce these salaries to offset the raises. Op. Tex. Att'y Gen. No. JM-313 (1985). Similarly, in Op. Tex. Att'y Gen. No. MW-439 (1982), it was concluded that purchases of supplies and equipment using hot check fund money were not subject to the competitive bidding requirements normally applicable to county purchases. The opinion reasoned that "by virtue of the express language of the statute, the hot-check fund is explicitly placed beyond the reach of the commissioners court." *Id.* at 6.

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<sup>1</sup> TEX. CODE CRIM. PROC. ANN. art. 102.007(c) provides that the amount of the fee may not exceed:

- (1) \$10 if the face amount of the check or sight order does not exceed \$100;
- (2) \$30 if the face amount of the check or sight order is greater than \$100 but does not exceed \$300;
- (3) \$50 if the face amount of the check or sight order is greater than \$300 but does not exceed \$500; and
- (4) \$75 if the face amount of the check or sight order is greater than \$500.

More recently, in Op. Tex. Att’y Gen. No. DM-357 (1995), the hot check fund was found to be wholly outside the county budgeting process. The opinion stated as follows at page 5:

[T]o permit a county judge, or the county auditor on behalf of the county judge, to require the county [district] attorney to submit proposed revenues and expenditures for the county attorney’s fee [hot check] fund for the upcoming fiscal year would be tantamount to providing the county commissioners court an indirect means of controlling the fund . . . or a means of interfering with the county [district] attorney’s exclusive discretion over the fund . . . .

The opinion further concluded that TEX. LOC. GOV’T CODE ANN. § 114.002 “does not authorize a county auditor to require the county attorney to report his or her projection of revenues and expenditures for the fund for the succeeding fiscal year.” *Id.* at 7.

In an extension of this reasoning, Tex. Att’y Gen. LO 96-074 found that a county investment officer is not responsible for the investment of a district attorney’s hot check fund under the provisions of the Public Funds Investment Act.<sup>2</sup> LO 96-074 at page 4 states that:

The district attorney, as opposed to the county commissioners court, has the sole authority to administer the hot check fund. The commissioners court does not have the authority to invest monies in the fund. Therefore, we conclude that the county’s investment officer is not responsible for the investment of the hot check fund under the act. (citations omitted)

## DISCUSSION

The question presented was considered in Op. Tex. Att’y Gen. No. JM-632 (1987) (“JM-632”), which concluded that interest earned on the hot check fund must be credited to the county general revenue fund rather than to the hot check fund itself. For the reasons discussed below, it is requested that the Attorney General reconsider JM-632.

The issue of how to treat the interest earned on various types of funds has generated many Attorney General opinions. The analytical approach in these opinions has been to first determine whether the funds at issue are constitutionally dedicated funds, in which case the interest may be spent only for the purpose for which the fund was created. Conversely, if the fund is not constitutionally dedicated but created by statute, interest may be credited to the general fund. *See, e.g.*, Op. Tex. Att’y Gen. No. JM-549 (1986). It is clear that the hot check fund is statutory rather than constitutional.

An exception to the foregoing rule applies when a statutory fund exhibits the characteristics of a trust. As stated in Op. Tex. Att’y Gen. No. JM-566 (1986) at 6:

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<sup>2</sup> TEX. GOV’T CODE ANN. §§ 2256.001 - .026 (Vernon 1998).

Opinions issued by this office consistently have maintained that interest on such trust funds becomes part of the principal. See Attorney General Opinions JM-306, JM-300 (1985); MW-82 (1979); H-1040 (1977); M-468 (1969). Cf. Attorney General Opinions MW-338 (1981); H-1187 (1978). The issue, then, is whether the funds about which you inquire are trust funds, as opposed to statutory funds. . . .

The opinions cited above indicate that in order to be characterized as trust funds, the funds in question should reflect, among other things, (1) that they are administered by a trustee or trustees, (2) that the funds neither are granted to the state in its sovereign capacity nor collected for the general operation of state government, and (3) that they are to be spent and invested for specific, limited purposes and for the benefit of a specific group of individuals. Being in the nature of a trust, such funds are entitled to retain the proceeds from their investment. Attorney General Opinions MW-481 (1982); M-468 (1969).

With regard to the first criteria, JM-632 concluded that the hot check fund is not administered by a trustee or by someone "in trust." The language specifying that the fund be administered by the district attorney "is in no material way different from that which reposes in the comptroller the responsibility to perform all functions incident to the administration of the bingo tax, . . . the banking franchise tax, . . . and the mixed beverage tax." *Id.* at 2. According to JM-632, nothing contained in TEX. CODE CRIM. PROC. ANN. art. 102.007 establishes any higher duty for the district attorney in administering the hot check fund than is otherwise required of all public officials.

Concerning the second criteria, Article 102.007(f) limits use of the hot check fund to paying salaries and expenses of the district attorney's office. "But the language so earmarking the funds differs in no material way from language typically found in the Appropriations Act directing the expenditure of state funds." *Id.* at 3.

A similar conclusion was reached in JM-632 regarding the third criteria. The article does not specify any particular group of individuals for which the fund is intended to benefit, nor does the language differ in any "material way from the language typically found in the Appropriations Act directing the expenditures of state funds." *Id.* at 3.

Although the opinions appear to be applying the three-prong test described above, a careful review reveals that the deciding factor is the use of the terms "trust," "in trust," or "trustee" in the enabling legislation. For example, in Op. Tex. Att'y Gen. No. JM-539 (1986), it was determined that the provision in the Local Sales and Use Tax Act requiring the Comptroller to deposit "with the State Treasurer in trust" any such taxes collected on behalf of a local taxing unit entitled such local taxing unit to be credited with the interest earned on its account.<sup>3</sup> See

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<sup>3</sup> There is also a series of opinions concluding that funds administered by trustees are entitled to retain depository interest. Op. Tex. Att'y Gen. Nos. JM-306 (1985) (Unemployment Compensation Fund); JM-300 (1985) (Law

also Tex. Att'y Gen. LO No. 92-69, which concluded that the Auctioneer Education and Recovery Fund was a trust fund based on statutory language establishing it as a "special trust fund with the comptroller administered by the department . . . ."<sup>4</sup>

Use of trust terminology should not be dispositive. The language used in Article 102.007 (f) regarding the hot check fund is clearly as restrictive as any required to create a trust. It speaks in terms of establishing a "special fund to be administered by the . . . district attorney," at his or her "sole discretion," for the limited purpose of defraying the "salaries and expenses of the prosecutor's office," subject to the further limitation that the funds not be used to increase the district attorney's salary. As previously discussed, Article 102.007 has been interpreted to remove the hot check fund from any control by commissioners court, including requirements concerning competitive bidding, the county budgeting process, and investment of the fund by the county investment officer. More recently, your office issued an opinion concerning the dealer's motor vehicle inventory escrow account maintained by the tax assessor-collector. Op. Tex. Att'y Gen. No. DM-398 (1996). Guidance concerning the use of interest generated by the escrow account is set forth in TEX. TAX CODE ANN. § 23.122 (c) (Vernon 1998) as follows:

The collector shall retain any interest generated by the escrow account to defray the cost of administration of the prepayment procedure established by this section. *Interest generated by an escrow account created as provided by this section is the sole property of the collector, and that interest may be used by no entity other than the collector.* Interest generated by an escrow account may not be used to reduce or otherwise affect the annual appropriation to the collector that would otherwise be made. (emphasis added)

This is extraordinarily restrictive language. Although the opinion did not address the precise issue raised here, it did observe that "In our view, these funds are analogous to the 'hot-check fund' administered by the district attorney pursuant to article 102.007 of the Code of Criminal Procedure." DM-398 at 2.

The discussion of the second and third trust criteria in JM-632 is abbreviated at best. With respect to both, the opinion simply concludes that the language used in Article 102.007(f) "differs in no material way from language typically found in the Appropriations Act directing the expenditure of state funds." *Id.* at 3. This reasoning is flawed. The statute itself, together with the numerous Attorney General opinions cited above, make it abundantly clear that the legislature has neither granted hot check funds to the county in its sovereign capacity nor authorized the collection of these funds for the general operation of the county. As acknowledged in Op. Tex. Att'y Gen. No. DM-398 (1996) at 2:

We believe it was the intent of the legislature, in denominating interest generated by the inventory escrow account as the "sole property" of the collector to indicate

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Enforcement and Custodial Officer Supplemental Retirement Fund); MW-82 (1979) (Fire Fighters' Relief and Retirement Fund); and H-1040 (1977) (Employees Life, Accident and Health Insurance and Benefits Fund).

<sup>4</sup> TEX. REV. CIV. STAT. ANN. art. 8700, § 5A(a) (Vernon 1998).

that such funds, like the hot-check fund, were not subject to the control of the commissioners court.

Concerning the third criteria, it is equally apparent that the specificity employed by the legislature in limiting the use of the hot check fund is sufficient. It "may be used only to defray the salaries and expenses of the prosecutor's office, but in no event may the . . . district attorney . . . supplement his or her own salary from the fund." Article 102.007(f). JM-632 concluded that the omission of a "specific or identifiable group of individuals or recipients" to receive the funds was fatal, citing, among other authority, Op. Tex. Att'y Gen. No. JM-539 (1986). The complete discussion of the third criteria in JM-539 is as follows: "Each statute specifies the purposes for which such taxes may be spent, with each taxing unit receiving the amount of taxes that each imposes." *Id.* at 4. Section 9 of the Local Sales and Use Tax Act (now TEX. TAX CODE ANN. § 321.506), which was being analyzed in JM-539, provided that "[m]oney collected under this [a]ct is for the use and benefit of the cities of the state; but no city may pledge anticipated revenue from this source to secure the payment of bonds or other indebtedness." This purpose is far less specific than the one enunciated in the hot check fund statute.

#### CONCLUSION:

It is respectfully suggested that the conclusion reached in JM-632 should be reconsidered. The hot check fund is (1) administered by the district attorney in the same manner and with the same restrictions applicable to any trustee; (2) neither granted to the county in its sovereign capacity nor collected for the general operation of county government; and (3) spent and invested for specific and limited purposes. It appears to the District Attorney that interest earned on the hot check fund should accrue to the fund itself. We would appreciate having your view.